



H.R. 3773 – FISA Amendments Act of 2008

EXECUTIVE SUMMARY

The new Democrat FISA proposal is being considered on the floor under a closed rule on March 13, 2008. This original legislation was introduced by Representative John Conyers (D-MI) on October 9, 2007. The House passed H.R. 3773 by a vote of 227 to 189 on November 15, 2007. The Senate struck the text from H.R. 3773, substituted its version (S. 2248), and passed it on February 12, 2008, by a vote of 68 to 29.

Unlike the bipartisan Senate-passed bill, the new Democratic proposal requires the Attorney General and the Director of National Intelligence to obtain FISA court approval before the Government may direct surveillance at persons reasonably believed to be outside the United States. It includes a statement of FISA exclusivity that restricts the President's Constitutional powers by requiring express statutory authorization for any type of foreign surveillance except as provided by FISA law, regardless of national emergency.

The bill does *not* provide any retroactive liability protection for those telecommunications providers that are alleged to have assisted the intelligence community's foreign surveillance efforts in the aftermath of September 11, 2001. It also establishes a Commission to ascertain, evaluate, and report on the facts and circumstances relating to electronic surveillance activities from 9/11/01 to 1/17/07.

FLOOR SITUATION

H.R. 3773 is being considered on the House floor under a closed rule. The rule:

- Provides for consideration of the Senate amendment to H.R. 3773.
- Makes in order a motion by the chairman of the Committee on the Judiciary to concur in the Senate amendment with the amendment printed in the report of the Rules Committee accompanying the resolution.
- Waives all points of order against the motion except those arising under clause 10 of rule XXI.
- Provides that the Senate amendment and the motion shall be considered as read.
- Provides one hour of debate on the motion, with 40 minutes equally divided and controlled by the Chairman and Ranking Republican of the Judiciary Committee and 20 minutes equally divided and controlled by the Chairman and Ranking Republican of the Intelligence Committee.
- Provides that, notwithstanding the operation of the previous question, the Chair may postpone further consideration of the motion to a time designated by the Speaker.

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SUMMARY

Procedures for Targeting Certain Persons Outside the United States Other than U.S. Persons: Unlike the Senate passed bill, the new Democratic proposal requires the Attorney General and the Director of National Intelligence to obtain FISA court approval before the Government may direct surveillance at persons reasonably believed to be outside the United States.

The bill requires the Attorney General (AG) and the Director of National Intelligence (DNI) to submit targeting, minimization, and additional acquisition procedures to the FISA Court. These procedures must be accompanied by a certification by the AG and DNI that the surveillance target is reasonably believed to be outside of the U.S. The Democrat proposal would delay surveillance up to 30 days (with an option for extension) until the FISA Court approves the certification and procedures.

There is an exception included for emergency situations that allows immediate surveillance, but the certification (including the basis for emergency) must be submitted within 7 days and approved by the Court under the same standard. The FISA Court is granted 30 days to determine the legality of the surveillance.

Assistance from Communications Providers: The bill grants the AG and the DNI the authority to direct electronic communications providers to assist the government in surveillance activities approved by the FISA Court while providing liability protection for future help provided by these companies. The bill also authorizes compensation, at the prevailing rate, for a person who provides information, facilities, or assistance.

- Failure to Comply: The bill provides a method for the government to file a petition with the FISA Court with respect to any failure to comply with a directive to provide assistance in acquiring intelligence information. Individuals that fail to comply with the court order may be held in contempt of court. It also grants the providers the right to challenge the directive by petitioning the FISA Court and establishes a judicial framework for reviewing a challenge.

Surveillance of U.S. Persons Outside the U.S.: The bill, for the first time, requires a FISA order for collecting intelligence on U.S. persons outside the U.S. It also specifically prohibits intentionally targeting individuals located in the U.S. as well as intentionally targeting individuals outside the U.S. in order to indirectly target a particular person within the U.S.

The surveillance application must include a description of 1) the identity or description of the U.S. person who is targeted and of the federal officer making the application; 2) the facts and circumstances relied upon to justify that the targets are outside the country are an agent of a foreign power; 3) the nature of the information sought; 4) a certification from the AG; and 5) the minimization standards. The FISA Court must review the probable cause, the minimization procedures, and the certification. If approved, the surveillance orders are good for a maximum of 90 days, but may be extended for an additional 90 days with a renewal application. There is an exception included for emergency situations that allows immediate surveillance, but an application must be submitted within 7 days.

Acquisitions Assessments and Reviews: The bill requires the AG and the DNI to assess compliance with the targeting and minimization procedures, guidelines, and certifications at least once every 6 months. It allows the Inspector General at the Department of Justice as well as the Inspector General for any part of the intelligence community that conducts foreign intelligence gathering to assess its department, agency, or element's compliance. Additionally, each element of the intelligence community conducting surveillance authorized in the bill must provide an annual review of that includes: 1) the number of



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intelligence reports referencing a U.S. person's identity; 2) U.S. persons' identities disseminated; and 3) the number of targets later determined to be in the U.S.

Congressional Oversight: The bill also requires the Attorney General to submit a report at least once every 6 months detailing 1) the number of certifications and directives; 2) any actions to challenge a directive; 3) description of any incidents of noncompliance; and 4) total number of orders granted, modified, or denied.

Streamlining the FISA Application Process: The bill modifies a number of aspects of the FISA process in order to harmonize the application and reduce paperwork requirements. It also grants the Deputy Director of the Federal Bureau of Investigation the authority to make FISA applications.

Statement of Exclusive Means by which Electronic Surveillance and Interception of Certain Communications may be Conducted: The bill includes a statement of FISA exclusivity that restricts the President's Constitutional powers by requiring express statutory authorization for any type of foreign surveillance except as provided by FISA law, regardless of national emergency.

Note: This "exclusive means provision" is nearly identical to the amendment offered by Senator Feinstein (D-CA) during Senate consideration. The Senate rejected Sen. Feinstein's (D-CA) amendment by a vote of 57 to 41 (60 required). The Senate-passed bill contains an exclusive means provision that does not impair the President's ability to respond to national emergencies or imminent threats. During Senate floor debate, Senator Bond (R-MO) argued against the bill, stating "During the next attack on our country, or in the face of an imminent threat, the Congress may not be in a position to legislate an express authorization of additional means."

Investigation into the Terrorist Surveillance Program: The bill requires an investigation into the President's Terrorist Surveillance Program by the Inspectors General (IG) of DOJ, NSA, and other elements of the intelligence community. In order to carry out this investigation, the bill grants the IGs unfettered access to all documents, materials, and communications regarding the program. A preliminary report is due within 60 days of the bill's enactment, and the final report is due within 1 year of enactment.

Liability: The bill does *not* provide any retroactive liability protection for those telecommunications providers that are alleged to have assisted the intelligence community's foreign surveillance efforts in the aftermath of September 11, 2001. The bill only provides for the submission of highly classified national security information, including that upon which the Government asserted the state secrets privilege, to the court for review and a factual and legal determination.

Note: The [Washington Post](#) recently defined this dispute over sensitive information: "In the bitter Washington dispute over whether to give the companies legal immunity, there is one thing on which both sides agree: If the lawsuits go forward, sensitive details about the scope and methods of the Bush administration's surveillance efforts could be divulged for the first time." (3/2/08)

Commission on Warrantless Electronic Surveillance Activities: The bill establishes a Commission to ascertain, evaluate, and report on the facts and circumstances relating to electronic surveillance activities from 9/11/01 to 1/17/07. The Commission would be composed of 9 respected and qualified individuals (5 appointed by the Speaker and Senate Majority Leader and 4 appointed by the House and Senate Minority Leaders). The Commission is granted the power to issue and enforce subpoenas. It is also granted authority to access any Government documents and information relevant to its investigation. The Commission must issue a report within a year of the bill's enactment.

Sunset: The bill's provisions sunset at the end of 2009.



BACKGROUND

The Foreign Intelligence Surveillance Act (FISA) of 1978 created the framework for foreign intelligence gathering using electronic surveillance. The FISA law established two courts, the U.S. Foreign Intelligence Surveillance Court (FISC), and the U.S. Foreign Intelligence Surveillance Court of Review, to authorize these foreign intelligence gathering activities.

In 1978, almost all international calls, or long-haul communications, were made over the air and bounced off satellites wirelessly. Those communications did not require an order under the FISA statute.

To protect the civil liberties of Americans, FISA required court orders for any signals that went through a wire, which is how most short-haul communications were conducted at the time the law was enacted.

Technology, however, has progressed by leaps and bounds in the six years since the Sept. 11 attacks, let alone in the three decades since the FISA laws were crafted. The outdated FISA laws restricted our intelligence community from utilizing a key tool in fighting the war on terror and protecting our national security.

Prior to enactment of the Protect America Act of 2007 (P.L. 110-55) in August 2007, wholly international communications transmitted over a wire required a FISA order. This requirement hindered our intelligence community's ability to collect vital intelligence from terrorists communicating with other foreign intelligence targets located in a foreign country.

It is difficult to compile enough information in a short period of time on a foreign person of interest to satisfy the FISA statute, and this is where the terrorist loophole arises.

According to the Director of National Intelligence, Michael McConnell, "We are significantly burdened in capturing overseas communications of foreign terrorists planning to conduct attacks inside the United States. We must make the requested changes to protect our citizens and the nation. In today's threat environment, the FISA legislation is not agile enough to handle the community's and the country's intelligence needs." ([Testimony to Senate Intelligence Committee, 5/1/07](#))

On August 4, 2007, the House passed the Protect America Act, a bipartisan act that closed the terrorist loophole. The law allowed our intelligence community to more effectively collect foreign intelligence in foreign lands, enabling them to obtain critical information at the critical time. President Bush signed this short-term fix into law on August 5, 2007. It expired on February 2008.

The House passed additional FISA legislation, H.R. 3773, on November 15, 2007, by a vote of 227-189. 184 Republicans voted against H.R. 3773 arguing that it fails to give the intelligence community the tools it needs to quickly respond to terrorist threats and inappropriately inserts the courts into the approval process for intelligence collection. The Administration threatened to veto H.R. 3773 citing similar concerns. During committee consideration of H.R. 3773, Republicans in both the Judiciary Committee and the Intelligence Committee offered a substitute amendment that would have extended the Protect America Act permanently and would have provided retroactive liability protection to companies alleged to have assisted the Government in the aftermath of the 9/11 attacks.

Congress passed and the President signed into law a 15-day extension (H.R. 5104) on January 29, 2008. The Senate passed the FISA Amendments Act (S. 2248) on February 12, 2008, by a vote of 68 to 29. President Bush [supports the bipartisan Senate-passed bill](#), arguing that it will "ensure our intelligence professionals have the tools they need to make us safer...The Senate bill also provides fair and just



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liability protections for companies that did the right thing and assisted in defending America after the attacks of September the 11th."

House Democrat Leadership ignored calls by House Republicans to bring up the bipartisan Senate bill, preferring instead to let the Protect America Act to lapse on February 16, 2008.

Rep. Heather Wilson (R-NM) has also proposed narrowly-tailored legislation to close this loophole by allowing surveillance targeting foreign communications without a warrant.

During the 109th Congress, the House passed H.R. 5825, The Electronic Surveillance Modernization Act, which fundamentally modernized and enhanced FISA. The bill, however, never passed the Senate.

ADDITIONAL VIEWS

President Bush: "This week House leaders are finally bringing legislation to the floor. Unfortunately, instead of holding a vote on the good bipartisan bill that passed the United States Senate, they introduced a partisan bill that would undermine America's security. This bill is unwise. The House leaders know that the Senate will not pass it. And even if the Senate did pass it, they know I will veto it." ([Statement, 3/13/2008](#))

Republican Leader John Boehner (R-OH): "This latest FISA proposal from House Democratic leaders is dead on arrival. It would outsource critical national security decisions to unelected judges and trial lawyers. It would hand over valuable national security oversight to a new commission charged with handling matters which already fall within the responsibilities of the existing House Intelligence Committee. And it would leave patriotic third parties exposed to unfettered and costly lawsuits at the hands of trial lawyers who are counting on their allies in Congress to block real FISA modernization." ([Press Release, 3/11/2008](#))

COST

There was no Congressional Budget Office cost estimate available at the time of this publication.

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